

Oil and Gas, Natural Resources, and Energy Journal

Volume 7 | Number 2

The 2021 Survey on Oil & Gas

December 2021

Ohio

Tim McKeen

Melissa Grimes

Follow this and additional works at: <https://digitalcommons.law.ou.edu/onej>



Part of the [Energy and Utilities Law Commons](#), [Natural Resources Law Commons](#), and the [Oil, Gas, and Mineral Law Commons](#)

Recommended Citation

Tim McKeen & Melissa Grimes, *Ohio*, 7 OIL & GAS, NAT. RESOURCES & ENERGY J. 393 (2021), <https://digitalcommons.law.ou.edu/onej/vol7/iss2/18>

This Article is brought to you for free and open access by University of Oklahoma College of Law Digital Commons. It has been accepted for inclusion in Oil and Gas, Natural Resources, and Energy Journal by an authorized editor of University of Oklahoma College of Law Digital Commons. For more information, please contact darinfox@ou.edu.

ONE J

Oil and Gas, Natural Resources, and Energy Journal

VOLUME 7

NUMBER 2

OHIO



Tim McKeen * & *Melissa Grimes* **

* Tim McKeen focuses his practice in oil and gas law throughout the Appalachian Basin, specializing in title, due diligence and mineral acquisitions. Mr. McKeen is the author of the American Association of Professional Landmen's Ohio comparative law article on oil and gas and is a frequent speaker for industry groups on oil and gas issues throughout Ohio, West Virginia and Pennsylvania. He has also authored several law review articles on Ohio oil and gas issues. Mr. McKeen is the Leader of the firm's Mineral Title and Energy Real Estate team.

** Member, Steptoe & Johnson PLLC.

The authors would like to thank Delainey Banks, Summer Associate at Steptoe & Johnson PLLC, for her contributions to this article

Table of Contents

I. Introduction	394
II. Statutory Law	395
A. Passed Legislation	395
1. Natural Gas and Propane Service	395
B. Proposed Bills	395
1. Fossil Fuel and Gas Pipelines	395
2. Brine as a Commodity	396
3. Utilization for Oil and Gas Operations	396
III. Administrative Law	397
IV. Common Law	398
A. Ohio Supreme Court	398
1. Marketable Title Act to extinguish mineral interests	398
2. Recitals and references to prior reservations under the MTA	399
3. Notice Requirements and Reasonable Due Diligence of the Marketable Title Act	400
4. State ex rel. Omni Energy Group v. ODNR	401
5. Suspension of Injection Wells	402
B. District Court Cases	403
1. Production of “Paying Quantities”	403
2. MTA Application to Severed Mineral Rights	404
3. “Other minerals” language in Ohio deeds include oil and gas	405
4. “Other minerals” language in Ohio deeds include oil and gas	406
5. Adverse Possession of Mineral Rights Through Shallow Drilling	407
6. Title Transaction Location of Filing	408
7. Residuary clause as a savings event	409
V. Conclusion	410

I. Introduction

For the period of August 1, 2020 through July 31, 2021, there were important changes in the landscape of oil and gas law in Ohio. The Ohio Legislature passed a bill concerning Natural Gas and Propane Services and multiple courts decided a number of cases interpreting the Marketable Title Act, Dormant Mineral Act, and saltwater injection well permits; however, no significant changes were made through administrative law by the Ohio Department of Natural Resources-Division of Oil and Gas Resources Management. Consequently, the most noteworthy changes in Ohio oil and gas law between August 1, 2020 and July 31, 2021 have occurred in the courts.

II. Statutory Law

A. Passed Legislation

1. Natural Gas and Propane Service

House Bill 201 (sponsored by Rep. Jason Stephens R-Kitts Hill) was presented to the House on March 10, 2021, passed by the Senate on June 24, 2021, and was signed by Governor Mike DeWine on July 1, 2021. Beginning on September 30, 2021, this bill will enact sections 4933.40, 4933.41, and 4933.42 of the Ohio Revised Code. Said sections guarantee access to natural gas and propane by any supplier that is certified to provide services in that location, thus guaranteeing that every person has a right to obtain any available distribution service or competitive retail natural gas service from gas suppliers or propane service.¹ Upon its passage, Ohio became the 19th state that has either passed or will have passed what is known as a natural gas “preemption” bill into law. This law will bar political subdivisions, such as a “township, county, or municipal corporation,” from enacting laws that would limit, prevent, or prohibit a consumer within its boundaries from using distribution services, retail natural gas service, or propane. Furthermore, the bill creates a competitive market in retail natural gas services from competitive retail natural gas service suppliers.

B. Proposed Bills

1. Fossil Fuel and Gas Pipelines

Ohio House Bill 192 (the “Bill”) was introduced on March 9, 2021 to enact section 4933.40 of the Revised Code which will prohibit local governments such as counties, townships, and municipal corporations from prohibiting or limiting energy generation from fossil fuels and the construction or use of a pipeline to transport oil or gas.²

Proponents for this Bill advocate for protecting a person’s choice to use natural gas in their homes and address the possibility of increased prices for Ohio residents by local governments enacting potential prohibitions of natural gas.

This Bill was referred to the Committee of Energy and Natural Resources on March 10, 2021. No vote is scheduled at this time.

1. OH LEGIS 33 (2021), 2021 Ohio Laws File 33 (Sub. H.B. 201).

2. 2021 Ohio House Bill No. 192, Ohio One Hundred Thirty-Fourth General Assembly - 2021-2022 Session.

2. Brine as a Commodity

Ohio House Bill 282 and Ohio Senate Bill 171 (the “Bills”) both propose to enact section 1509.228 of the Revised Code to establish, under certain conditions and requirements, brine as a commodity, which would allow the sale of brine from oil and gas operations and exempt it from requirements otherwise applicable to brine.³ Under the proposed Bills, in certain instances, brine from conventional wells can be permitted for use as a deicer and a dust suppressant on roads by municipalities and government agencies. Upon the passage of either of these Bills, oil and gas produced seawater, used to melt ice on roads, could become more prevalent within the State.

Ohio House Bill 282 was introduced to the House May 3, 2021 and referred to the Committee of Energy and Natural Resources May 4, 2021. Ohio Senate Bill 171 was introduced to the Senate April 27, 2021 and referred to the Committee of Agriculture and Natural Resources April 28, 2021. No vote is scheduled at this time.

3. Utilization for Oil and Gas Operations

Ohio House Bill 152 (the “Bill”) proposes to amend section 1509.28 of the Revised Code to revise the law governing unit operation and to enact changes pertaining to how oil and gas leasing is managed when a landowner refuses to lease their lands.⁴ Under current Ohio law, unitization provides a process for an applicant to advance with its oil and gas operations if a small minority of mineral owners in a proposed unit refuse to lease their minerals. An oil and gas operator can seek an order from the Ohio Department of Natural Resources to mandate landowners into oil and gas well units. Upon an operator’s application approval, landowners without a lease have their oil and gas rights placed into the unit. Such changes to section 1509.28 will include, but are not limited to:

- 1) Creating a minimum charge against nonconsenting landowners in the amount of 300%.

3. 2021 Ohio House Bill No. 282, Ohio One Hundred Thirty-Fourth General Assembly - 2021-2022 Session; 2021 Ohio Senate Bill No. 171, Ohio One Hundred Thirty-Fourth General Assembly - 2021-2022 Session

4. 2021 Ohio House Bill No. 152, Ohio One Hundred Thirty-Fourth General Assembly - 2021-2022 Session

- 2) Within 30 days of the Chief of the division of oil and gas resources management's unitization order, the unleased mineral owner must choose one of the following options:
 - Enter a lease with the operator for the unleased acreage in the unit, with a 12.5% net royalty and a lease bonus in the amount of 75% of market value of lease bonus rate for the acreage within the proposed unit times the amount of the landowner's acreage in the unit.
 - Consent to including the acreage in the unit and follow all terms of the proposed operating agreement.
 - Fail to consent and then be subject to the 300% charge on drilling and equipping costs.
 - Failure to elect within the time frame results in a lease at a 1/8th net royalty.
- 3) This law further adds protections in the trade secret, research, development, or commercial information of the operator secret, allowing the Chief permission to not disclose such information to the public, including public hearings.
- 4) It also allows for hearings on applications to be conducted remotely.
- 5) Requires hearings on unitization applications to be held within 30 to 60 days of an application for unitization.
- 6) Requires the issuance of the unit order within 30 days of the hearing unless it has been denied within that 30 days.

This Bill was introduced to the House February 23, 2021 and referred to the Committee of Energy and Natural Resources February 24, 2021. No vote is scheduled at this time.

III. Administrative Law

There were not any notable administrative law developments in Ohio during the time period of August 1, 2019 to July 31, 2020.

IV. Common Law

A. Ohio Supreme Court

1. Marketable Title Act to extinguish mineral interests

In *West v. Bode*,⁵ December 2, 2020, the Ohio Supreme Court issued its decision regarding whether the Ohio Marketable Title Act (“MTA”) can still operate independent of, and without an irreconcilable conflict of, the Ohio Dormant Mineral Act (“DMA”), which was expressly enacted for the purpose of creating a method of determining when a severed mineral interest is abandoned to extinguish ownership of previously severed oil and gas interests. The Court determined that either the Marketable Title Act *or* the Dormant Mineral Act may be used to reunite a severed mineral interest with the surface property subject to that interest.

The surface owners claimed that oil and gas interests were extinguished by operation of the MTA.⁶ The heirs of royalty interest holders argued that the DMA’s more specific provisions exclusively govern the parties’ claims to the oil and gas royalty interests.

The MTA, enacted in 1961, has the purpose to simplify title of land ownership by automatically by extinguishing interests and claims that existed prior to the effective date of the “Root of Title.”⁷ The DMA, enacted in 1989 and amended in 2006, operates by providing a surface owner an evidentiary device that they may use in a quiet-title action to clear title by reuniting the mineral and surface ownership through abandonment.⁸ Although they have similar purposes and provide the same results, the court determined that they operate differently from one another. The MTA applies automatically through operation of law to extinguish old claims and interests 40 years after the “Root-of-Title.” The DMA instead will only operate as an “evidentiary device” that the surface own can use on their own with a shorter, 20-year “look-back” period and alternative “saving events” that focus on the owner’s intent.⁹ While the Court noted that the MTA and the DMA were certainly different—observing that the MTA has a longer lookback period and is self-executing and that the DMA has different saving events and notice requirements—it held that those

5. *West v. Bode*, 165 N.E.3d 298 (Ohio 2020), reconsideration denied, 159 N.E.3d 1168 (Ohio 2020)

6. *West*, 165 N.E.3d at 295.

7. *Id.* at 297.

8. *Id.* at 304.

9. *Id.* at 301-302.

differences were reasonable and reconcilable. The Court further observed that they shared a central purpose of “simplifying and facilitating land title transactions by allowing persons to rely on a record chain of title” and that a mineral interest holder could comply with both statutory schemes to avoid losing any mineral interest. The Court stated that it was reasonable to believe that the legislature intended for the DMA to provide surface owners an additional mechanism to accomplish reunification of dormant mineral interests with the surface estate in order to promote the use of natural resources when those interests could not be extinguished under the MTA.

2. Recitals and references to prior reservations under the MTA

In *Erickson v. Morrison*,¹⁰ March 16, 2021, the Ohio Supreme Court expanded upon the interpretation of the Ohio Marketable Title Act’s (“MTA”) R.C. 5301.49(A) exception that provides that the marketable record title is taken subject to interests inherent in the record chain of title, “provided that a general reference . . . to . . . interests created prior to the root of title shall not be sufficient to preserve them, unless specific identification be made therein of a recorded title transaction which creates such . . . interest.” In its opinion, the court determined whether recitals or references to a prior reservation are specific enough to satisfy the MTA’s requirement to preserve a mineral owner’s interest and that it not be a “general reference.”¹¹ The court concluded that references to prior reservations do satisfy the MTA.

In *Erickson*, the severed oil and gas interests were first reserved in 1926 by the Logans, who subsequently sold the interests to the Ogles specifically referring to the 1926 transaction. The surface interest were transferred multiple times, all with the original “excepting and reserving” language pertaining to the oil and gas rights. In 2017, the Ogles heirs filed an action against the surface owners, the Morrisons, to have their ownership of the Interest preserved.¹² The Court held that “The Marketable Title Act does not require that a reservation set forth the name of the person holding the interest in order to be specific and preserve the interest.”¹³ Furthermore, a recital in later deeds that contain reservation language nearly identical to the original severance language was specific enough to point a reviewer back to the original deed and, as such, sufficient to preserve the interest

10. *Erickson v. Morrison*, 2021-Ohio-746, reconsideration denied, 168 N.E.3d 526 (Ohio 2021)

11. *Erickson*, 2021-Ohio-746 at ¶ 31.

12. *Id.* at ¶ 8.

13. *Id.* at ¶ 4.

under the MTA even if the holder or heirs are not recorded in the reservation.

3. Notice Requirements and Reasonable Due Diligence of the Marketable Title Act

In *Gerrity v. Chervenak*,¹⁴ December 17th, 2020, The Ohio Supreme Court concluded that the circumstances of each individual case will control how a surface owner must research in finding mineral interest holders before acting by publishing notice through publication under the Ohio Dormant Mineral Act (“DMA”). The Court rejected adopting a bright line rule for title searches (Leaving it up to the legislature if at all).

In *Gerrity*, Timothy Gerrity sought a judgment quieting title and declaring him the owner of the mineral estate underlying a 108-acre property in Guernsey County. John Chervenak—trustee of the Chervenak Family Trust, owner of the surface estate—claimed that the mineral estate belonged to the trust because it had been deemed abandoned under the DMA. Mr. Gerrity, conversely, claimed that Mr. Chervenak’s use of the DMA was ineffective because he failed to comply with the Act’s notice requirements. The Guernsey County Court of Common Pleas awarded summary judgment to Mr. Chervenak, and the Fifth District Court of Appeals affirmed that decision.

The Supreme Court of Ohio held that Mr. Chervenak complied with the DMA’s notice requirements. In so doing, the Court rejected Mr. Gerrity’s argument that a surface owner must identify all mineral interest holders and attempt service by certified mail on each because the DMA acknowledges that identification of all mineral interest holders may not be possible and therefore permits notice by other means (i.e., publication). The Court declined to adopt a bright-line rule detailing the efforts a surface owner must expend before resorting to notice by publication, leaving the creation of such a rule to the legislature. Nevertheless, the Court provided some guidance by reviewing Mr. Chervenak’s notice efforts. Prior to resorting to service by publication, Mr. Chervenak searched the records of Guernsey County where the property was located and learned that the mineral interest holder of record had a Cleveland address. Mr. Chervenak then searched in the Cuyahoga County Recorder’s Office and Probate Court for records that would establish a more recent address or heirship information. Having found none, he mailed notice to the Cleveland address, which was returned undelivered. The Court concluded that those efforts were reasonably

14. *Gerrity v. Chervenak*, 166 N.E.3d 1230 (Ohio 2020).

diligent, and that Mr. Chervenak properly resorted to service by publication. The Court also concluded that, under the circumstances, Mr. Chervenak was not required to perform an online search.

In conclusion, the Court held that a “[r]eview of public-property and court records in the county where the land subject to a severed mineral interest is located will generally establish a baseline of reasonable diligence in identifying the holder or holders of the severed mineral interest.” The Court emphasized, however, that whether additional efforts are necessary “will depend on the circumstances of each case.”

4. *State ex rel. Omni Energy Group v. ODNR*

In *State ex rel. Omni Energy Group, L.L.C. v. Ohio Dept. of Natural Resources, Div. of Oil & Gas Resources Mgt.*,¹⁵ December 9, 2020, the Ohio Supreme Court granted a writ of mandamus sought by Omni Energy Group, LLC (“Omni”) to discuss the validity of objections that were submitted concerning Omni’s two saltwater injection well permit applications. The Court held that Omni was not only entitled to the writ, but also determined that the division chief of the Ohio Department of Natural Resources, Division of Oil and Gas Resources Management (“ODNR”) does not have the legal authority to insist on a delay for a public meeting.

This case was brought to the Court to compel the division chief to either issue or deny their saltwater injection well permit applications.¹⁶ Omni filed applications in March 2019 and, after the requisite period of notice and comment, the ODNR received around 100 comments objecting to the placement of the injection wells.¹⁷ The division chief planned to hold an in person meeting concerning the applications; however, the meeting was changed to an online format due to COVID-19 restrictions. This change caused Murray Energy Corporation to file suit and seek temporary injunction against the use of an online forum, preferring the public meeting to be held in person.¹⁸

In their opinion, the Ohio Supreme Court granted a writ of mandamus, but instead of ordering the ODNR to promptly render a decision on the applications, the Court instead ruled upon the validity of the objections as required under Ohio Adm. Code 1501:9-3-06(H)(2)(c). The Court held that (1) the division chief does not possess legal authority to delay the

15. *State ex rel. Omni Energy Grp., L.L.C. v. Ohio Dept. of Nat. Res., Div. of Oil and Gas Res. Mgt.*, 2020-Ohio-5581.

16. *State ex rel. Omni Energy Group, L.L.C.*, 2020 -Ohio- 5581 at ¶ 1.

17. *Id.*

18. *Id.* at ¶ 6.

application process for a public meeting, as the statute requires specific time periods to be met (2) Omni had a clear legal right to a ruling on the validity of objections submitted against the applications; as mandated in the Administrative Code, and (3) there is a legal duty to determine if the objections received cross the code's threshold to require a hearing.¹⁹ As such, the court then established that the next step in issuing or denying the permits is to analyze the objections received before determining whether a hearing is needed.

5. Suspension of Injection Wells

In *State ex rel. AWMS Water Sols., L.L.C. v. Mertz*,²⁰ the Supreme Court reversed the judgment of the court of appeals granting summary judgment for the State and concluding that the claim was not unripe and summary judgment based on a takings claim was inappropriate because fact questions existed as to whether regulation was temporary, partial, or deprived the claimant of all economically beneficial use of the land.

This case arises from AWMS Water Solutions ("AWMS") application to the Ohio Department of Natural Resources Division of Oil and Gas Resources Management ("ODNR") for permits to construct and operate saltwater injection wells on 5.2 acres of industrial property. Shortly after being approved, earthquakes occurred near saltwater injection wells in Youngstown, Ohio. After AWMS filed their application to ODNR, the Ohio Governor allowed the ODNR to study and impose rules surrounding earthquakes triggered by the wells.²¹ Subsequently, operations of the one well ("Well #2") was subsequently suspended based on concerns of triggering recent earthquakes.²² Multiple appeals followed, but ODNR rejected all arguments, continually citing the possible, imminent danger posed by the operation of the well.²³

AWMS argued that it suffered a constitutional taking of its property when the ODNR suspended the operation of Well #2. In opposition, the State argued that AWMS had not been deprived benefit from their property, as they still had another operating well on the property ("Well #1). The Ohio Supreme Court concluded that genuine issues of material fact precluded summary judgment. The court analyzed the partial takings claim under the *Penn Central* factors as to the economic impact on AWMS for

19. *Id.* at ¶¶ 19-24.

20. 165 N.E.3d 1167 (Ohio 2020).

21. 165 N.E.3d at 1173.

22. *Id.* at 1174.

23. *Id.* at 1175.

suspending operation of Well #2. The Court heard experts from both AWMS and the State, who offered distinctly different, but equally well-reasoned, calculations in estimating the economic impact.²⁴ An AWMS expert estimated that the suspension resulted in over a 100% loss for investors in the company; however, the State's expert's estimate of loss was significantly lower. Thus, the Court found a clear dispute of fact regarding the economic impact of the Well #2's suspension and remanded to the Eleventh District.

B. District Court Cases

1. Production of "Paying Quantities"

In *Browne v. Artex Oil Co.*,²⁵ the Fifth District Court of Appeals of Ohio issued its opinion wherein it held that the oil and gas lease in question was held by "production in paying quantities" based on personal testimony from certain individuals who claimed that there was never a period of two or more years that the well was not pumped or produced. As such, the Appellees produced evidence sufficient to establish the absence of any genuine issue of material fact regarding production in paying quantities.

This case involved a 1975 oil and gas lease with a primary term of one year and a habendum clause extending the primary term for as "long thereafter as oil and gas, or either of them, is produced by lessee from said land or from a communized unit as hereinafter provided." The court of appeals concluded that the lessees had produced sufficient evidence of production of oil in "paying quantities" based on numerous affidavits from the owners of the Well, who testified that oil was sold consistently and that real estate taxes were assessed for the well during the relevant period.²⁶ The lessors asserted several arguments to the contrary, none of which the court found persuasive. First, the lessors argued the Ohio Department of Natural Resources ("ODNR") completions report showed a gap in reported production. The court noted the failure to file production reports with the ODNR does not demonstrate that oil was not in fact produced. Moreover, the ODNR reports did not show zero production. Second, the lessors pointed to a "Chief's Order" from the ODNR that required operations to be suspended due to the operator's failure to provide ODNR with its insurance policy and production reports for 1993. The court again reasoned that the order did not establish that production in fact ceased, only that it was

24. *Id.* at 1184-85.

25. *Browne v. Artex Oil Co.*, 2021-Ohio-2239 (Ohio Ct. App., 5th Dist., 2021)..

26. 2021-Ohio-2239 at ¶¶ 58-59.

ordered to cease. Third, the lessors argued that probate documents from the well operator's wife showed there was no production because there was no royalty income listed for 1993 or 1994.²⁷ However, the court noted that the wife never owned the well, as the operator had left the well to his grandchildren. Finally, the lessors argued the county auditor's records showed lack of production from 1997 to 1999, but the court stated the information in the records was "inconsistent and ambiguous" as it listed the well as "producing" but showed no average daily or total production.

The court of appeals affirmed the trial court's grant of summary judgment to the lessees and denial of summary judgment to the lessors. This case is notable as it provides an example wherein the courts looked to verbal testimony rather than written documentation from the typically reviewed sources regarding production in paying quantities.

2. MTA Application to Severed Mineral Rights

In *McCombs v. Dennis*²⁸, the Fifth District Court of Appeals discussed the application of the Ohio Marketable Title Act ("MTA") and the Ohio Dormant Mineral Act (DMA). In this case, the court determined that the MTA not only applies to any severed mineral interest, but it also is not the exclusive method for reuniting severed minerals with surface rights.

In *McCombs* the Patterson's conveyed 122 acres and reserved "all of the oil and gas."²⁹ After the surface changed ownership multiple times, Charles McCombs became the owner. David McCombs sought extinguishment of the previously severed mineral interest and filed a complaint to quiet title to 92 acres of the property in November 2019.³⁰ The Patterson heirs first argued that the MTA applies only to royalty interests and not severed mineral interests like the Patterson reservation. The court of appeals rejected that contention, explaining that the MTA did not limit its application to royalty interests and that the state supreme court had recently applied the MTA to several mineral interests without making any distinction between the two types of interests. The Patterson heirs also claimed that, based on the court's prior decisions in *Straits* and *Hefner*, McCombs could not rely on the MTA because neither his "deed nor his chain of title purports to convey the mineral rights to him." The court also rejected this, explaining that the decisions on which the Patterson heirs relied pre-dated *Blackstone* and that its later decisions "have effectively

27. *Id.* at ¶¶ 40-60.

28. 2021-Ohio-1181 (Ohio Ct. App., 5th Dist., 2021).

29. 2021-Ohio-1181 at ¶2.

30. *Id.* at ¶5.

overruled *Straits* and *Hefner*.” Finally, the Patterson heirs contended that the MTA was inapplicable, as the DMA “is the exclusive method for reuniting severed minerals with the surface rights.” The court dispatched that claim by explaining that the state supreme court had recently held “both the MTA and the DMA are to be given full force and effect with regards to severed mineral interest.”

3. “Other minerals” language in Ohio deeds include oil and gas

In *O’Kelley v. Rothenbuhler*,³¹ the Seventh District Court of Appeals issued its opinion discussing the specificity necessary to preserve a mineral interest under the Marketable Title Act (“MTA”). In its holding, it determined that the language of a 1969 deed reference “and also excepting the oil and gas minerals...” was not sufficiently specific to save a severed mineral interest from extinguishment under Ohio’s MTA, R.C. 5301.47 et seq.

In *O’Kelley*, in 1893, William Morris conveyed a 160-acre parcel of property to Mary Zonker. In that deed, Morris reserved “all oil, gas and minerals (including coal) of whatsoever kinds with full right to develop same and to operate on said premises therefore with the incidental rights and privileges necessary to such development and operation including among other things the right to locate and drill thereon and therein oil wells and gas wells to lay pipes to and from said wells.” The property was the subject of several conveyances before coming into the surface owners’ possession.

On August 9, 2019, Robert O’Kelley filed a complaint to quiet the title and claimed ownership based on the Morris reservation. The property was the subject of several conveyances including a 1969 deed (“Rothenbuhler Deed”) that referenced the previous reservation as “also excepting the oil and gas minerals including coal underlying the same heretofore conveyed.”³² For purposes of the MTA analysis, the root of title was the Rothenbuhler Deed from 1969, the most recent transfer filed prior to the 40-year look-back provision. The surface owners moved for summary judgement, arguing that the MTA extinguished the Morris reservation based

31. *O’Kelley v. Rothenbuhler*, reconsideration overruled sub nom. DR. ROBERT LEON O’KELLEY, JR., Pl.-Appellant, v. RONALD ROTHENBHULER ET AL., Defendants-Appellees. Additional Party Names: Constance Smith, Jason Lumbatis, Jennifer Rothenbuhler, Kenneth Rothenbuhler, Kevin Rothenbuhler, Kristy Rothenbuhler Lumbatis, Randy Smith, Rothenbuhler Oil and Gas, LLC, Sharon Rothenbuhler, SWN Prod. (Ohio), LLC, 2021-Ohio-2488

32. 2021-Ohio-1167 at ¶8.

on the 1969 Rothenbuhler Deed general reference to “also excepting the oil and gas minerals including coal underlying the same heretofore conveyed.”³³ The trial court granted summary judgment in favor of the surface owners, holding that the Rothenbuhler Deed reservation was not specific and, thus, the mineral interest reserved in the 1893 deed was extinguished under the MTA.

The Seventh District subsequently agreed. However, the court concluded that the references were “general references,” because of the lack of “any narrow precise considerations, limited details, or particulars as described in *Blackstone*.”³⁴ Unlike *Blackstone* and the recent Ohio Supreme Court *Erickson v. Morrison*, reference was not a “verbatim restatement” repeated from the original and subsequent deed transfers. Not only did the Rothenbuhler Deed lack similar language to the original deed from 1893, but the Rothenbuhler Deed also omitted the specified rights Morris originally reserved in the 1893 deed. The reference within the Rothenbuhler deed was mere “boilerplate language” that failed to reserve “specific, identifiable reservation of mineral rights.”³⁵ Thus, it lacked sufficient specificity and the court concluded the Rothenbuhler Deed could not have saved a severed mineral interest from extinguishment under Ohio’s MTA.

4. “Other minerals” language in Ohio deeds include oil and gas

In *O’Brandovich v. Hess Ohio Developments LLC*,³⁶ the Seventh District Court of Appeals again interpreted instances in which a reservation or conveyance of “coal and other minerals” would include oil and gas interest rights. The court concluded that the language of “coal and other minerals” does include oil and gas, because by 1940 oil and gas extraction was “common place” and presumed to include oil and gas rights unless expressly written otherwise.

In the case, the court determined whether the term “other minerals” would include oil and gas when a 1940 deed reservation primarily referenced coal extraction. The court analyzed previous cases interpreting similar language, such as *Detlor v. Holland*³⁷ and *Gordon v. Carter Oil Co.*,³⁸ both of which found that “other minerals” did not include oil and gas. However, when these cases were decided, the court reasoned that oil and

33. *Id.* at ¶30.

34. *Id.* at ¶44 (internal quotes omitted).

35. *Id.*

36. *O’Brandovich v. Hess Ohio Devs., LLC*, 2021-Ohio-1287

37. 57 Ohio St. 492, 49 N.E. 690 (1898).

38. 19 Ohio App. 319, 3 Ohio Law Abs. 43 (5th Dist.1924).

gas production were not a regular occurrence during the times the deeds were executed (1890 and 1902, respectively).³⁹ It was not until a couple of decades later where oil and gas production and reservations were routine. Thus, by the time the deed in this case was executed, 1940, oil and gas production was commonplace and presumed in the deed's language. Unless the deed expressed otherwise, "other minerals" would include oil and gas interests. Upon specific review of the 1940 deed at issue, the court believed that although the easement language primarily focused on the reservation of coal extraction,⁴⁰ it also discussed the mineral owner's right "to use, occupy and possess any of the surface of the above-described premises necessary, convenient or required for the exploring, drilling, testing, mining and removal of said coal or other minerals."⁴¹ This language, as explained by the court, was not inconsistent with the development of oil and gas on the property and did not counter the presumption.⁴² Furthermore, the deed's inclusion of the word "drilling" was relevant and consistent with multiple other minerals, such as oil and gas development.⁴³ Thus, the court concluded that the language of "coal and other minerals" does include oil and gas and affirmed the trial court's dismissal.

5. Adverse Possession of Mineral Rights Through Shallow Drilling

In *Tomechko v. Garrett*,⁴⁴ the Seventh District Court of Appeals discussed mineral right reservations and adverse possession of mineral rights. The court held that adverse possession of shallow oil and gas will also constitute adverse possession of deep oil and gas on a parcel if the shallow production "modified the subterranean structure" of the estate.

The court analyzed a case that contained a similar issue, *Diederick v. Ware*⁴⁵. In *Diederick*, the Kentucky court held that producing wells on a parcel of land met the requirements for adverse possession where it "modified the subterranean structure under the large tract of land."⁴⁶ The *Diederick* court found that land alteration and permeation of oil and gas caused by the withdrawal of oil and gas by drilling, would constitute

39. *O'Brandovich*, 2021-Ohio-1287 at ¶23.

40. *Id.* at ¶29.

41. *Id.*

42. *Id.*

43. *Id.* at ¶30.

44. 2021-Ohio-1377 (Ohio Ct. App., 7th Dist., 2021)..

45. 288 S.W.2d 643, (C.A. Ky. 1956),

46. *Tomechko*, ¶ 56 (internal citations omitted).

constructive possession of the estate.⁴⁷ Thus, if the shallow production of oil and gas “modified the subterranean structure,” there would be adverse possession of both the deep and shallow interest. The court concluded that the operation of oil wells on the tract modified the subterranean structure under the land.⁴⁸

On review of the case before them, the Court analyzed the facts supporting the adverse possession claim (i.e., leasing oil and gas rights, drilling under the lease, receiving all royalties, and doing so for more than twenty years) and determined that “these facts sufficiently establish overt acts of unequivocal character asserting ownership” by the Tomechkos.⁴⁹ It then concluded that “adverse possession of the deep rights should follow the shallow rights due to the alteration of the surface and subsurface from drilling and removing the oil and gas.”⁵⁰ Accordingly, the court of appeals reversed and modified the trial court’s ruling on the adverse possession issue “to also include adverse possession of the deep rights” by the Tomechkos.⁵¹

6. Title Transaction Location of Filing

In *Lucas v. Whyte*,⁵² the Seventh District Court of Appeals discussed the requirements of the MTA, whether the probate filings in a county other than where the property is located would be able to save an oil and gas reservation from extinguishment, whether a title transaction that takes place outside of the 40 year look back period of the MTA satisfies a title transaction, and the proper procedure for providing notice under the ODMA.

In 1914, John and Sarah Miller conveyed 25 acres of property in Monroe County to John McCoy, but reserved half of the oil and gas and all of the coal underlying the property (the “Miller Reservation”).⁵³ When John Miller died intestate in 1940, the Belmont County Probate Court sent the Monroe County Reporter a certificate of transfer that indicated his interest in the Miller Reservation. Upon the deaths of several of these predecessors, their estates were administered in Belmont County and purported to convey their interests in 1986, 1989, and 1999 as evidenced by Belmont County’s

47. 2021-Ohio-1377 at ¶56.

48. *Id.*

49. *Id.* at ¶52.

50. *Id.* at ¶53.

51. *Id.* at ¶59.

52. *Lucas v. Whyte*, 2021-Ohio-222, 167 N.E.3d 40.

53. *Lucas*, 167 N.E.3d at 42

public records.⁵⁴ Subsequently, in 2017 two heirs of the original reservation entered into oil and gas leases. Finally, the current surface owner did not attempt to serve notice via certified mail. Instead the owner opted to publish the notice in the Monroe County Beacon, a newspaper of general circulation in Monroe County.

Focusing on the language in R.C. 5301.47(D), which establishes the “title transaction” exception to extinguishment, the court majority rejected the argument that a title transaction filed in another county’s probate court and held that it “must be recorded in the county where the real property is located, in order for the R.C. 5301.49(D) exception to apply.”⁵⁵ The court further stipulated that an examiner should only have to look at the county records where the property sits, not outside of it.

The Court then looked to the oil and gas leases entered into by heirs in title of the original reservation. The Court reasoned that although an oil and gas lease would constitute a title transaction and effectually “save” the severed mineral interest, in this case, the oil and gas leases were entered into 51 years after the root of title, which is outside of the 40 year look back period and thus does not constitute a savings event.

Finally, the court determined that if a surface owner conducts a reasonable search for a severed mineral interest owner and is not successful, then publication in a newspaper of general circulation is sufficient to provide proper notice. However, because the court found the mineral interest extinguished under the MTA, it did not expand upon this argument.

The court concluded that probate filings outside the county where the property is located would not save an oil and gas reservation from extinguishment. Furthermore, the court determined that although a lease may satisfy a title transaction, if it is outside the 40 year look back period, it does not satisfy the MTA exception.

7. Residuary clause as a savings event

In *Hartline v. Atkinson*,⁵⁶ the Seventh District Court of Appeals discussed the application of the DMA to determine whether interest passing under the residuary clause of a last will and testament qualifies as a title transaction under the MTA. The court ultimately held that an interest passing under through a Last Will and Testament qualifies as a title

54. *Id.* at 46.

55. *Id.* at 48.

56. *Hartline v. Atkinson*, 2020-Ohio-5606, reconsideration denied, 2021-Ohio-575, appeal allowed, 168 N.E.3d 1208 (Ohio 2021).

transaction under the MTA if, pursuant to R.C. 5301.47(B) and (C), it is filed in the probate court.

On appeal to the Seventh District, the Hartlines argued that the trial court erred in granting summary judgement to the Webbs, arguing that the MTA did extinguish a portion of the severed mineral interest because there was an unbroken chain of title filed in the Monroe County Recorder's Office.⁵⁷ The Hartline's argued that Webb's Last Will and Testament devised all property to his wife, Belle Webb, but it did not affect the title because the Will failed to identify the Webb Interest. However, the court rejected this argument and relied on its previous holding in *Warner v. Palmer*. In *Warner*, the court held that "Recording, in the context of R.C. 5301.49(D), includes filing in the probate court."⁵⁸ In other words, a Last Will and Testament filed in probate court would suffice as "recording" under the MTA. Ultimately, the court acknowledged that although the interest at issue is not specifically listed in the will or probate proceedings, Webb's will was a title transaction⁵⁹. Consequently, the Court held a last will and testament filed in the probate records of the county where the interest is located within forty years of the root of title is a recorded title transaction under R.C. 5301.49(D).

V. Conclusion

As evidenced by the various cases listed above, Ohio courts continue to adjudicate numerous oil and gas issues, and it would be reasonable to expect further significant rulings from the Supreme Court of Ohio and the lower courts over the next few years.

57. *Atkinson*, 168 N.E.3d at ¶18.

58. *Id.*: citing R.C. 5301.47(B), (C).

59. *Id.* at ¶29.